STATE OF MICHIGAN

COURT OF APPEALS

GREATER LANSING ASSOCIATION OF REALTORS,

Plaintiff-Appellee,

v

JEANNE MENTZER-AMUNDSON, MIKE L. AMUNDSON, and, QUESTOR SERVICES, INC.,

Defendants-Appellants.

UNPUBLISHED
June 16, 2000

No. 210504
Ingham Circuit Court
LC No. 96-083457-CZ

Before: Smolenski, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff, Greater Lansing Association of Realtors, filed a multiple-count suit against defendants Jeanne Mentzer-Amundson (Jeanne) and Mike L. Amundson (Mike), for unauthorized use of plaintiff's Multiple Listing Service (MLS) in defendants appraisal business. The trial court entered a default judgment against defendants for failure to attend a pre-trial conference and for discovery violations. After a trial on damages, the court entered judgment against defendants in the amount of $341,076, taxable costs and interest for misappropriation of property, trademark infringement and unjust enrichment. Defendants appeal as of right. We affirm in part, vacate in part and remand.

Plaintiff collects detailed information from its members regarding property for sale in the greater Lansing area and publishes the information in the MLS on a weekly basis as a service to its members. Plaintiff also publishes monthly and quarterly MLS comparable sales books, which include the actual sales price for property, financing terms and number of days the property was on the market. Plaintiff's members who subscribe to the MLS service pay both dues to plaintiff and MLS fees for the information. A member who improperly distributes an MLS book can be fined up to $1,000 per violation.

On April 23, 1996, plaintiff filed a complaint against defendants seeking injunctive relief, an accounting and money damages for the misappropriation of trade secrets and unjust enrichment. Plaintiff alleged that defendants were not members of MLS and unlawfully used the MLS information in

their appraisal business. Plaintiff amended its complaint to include causes of action for unfair competition under 15 USC 1125(a), trademark dilution in violation of 15 USC 1125(c) and violation of MCL 445.903(1); MSA 19.418(3) for unfair trade practices. On July 10, 1997, the trial court entered a default judgment against defendants for failing to appear at a pre-trial conference and failure to comply with discovery orders. After a trial on damages, the court entered judgment in the amount of $341,076 for restitution for defendants' dishonestly obtained profits. The court noted that it was undisputed that defendants had used the MLS materials without authorization and that defendants Jeanne and Mike had committed perjury during the proceedings.

Defendants raise three issues on appeal, which we consolidate and restate as the following two issues:

I. Did the trial court abuse its discretion in failing to set aside the default judgment entered against defendants?

II. Did the trial court set forth sufficient findings of fact and conclusions of law to support a judgment against defendants in the amount of $341,076?

I.

Defendants' contention that the trial court abused its discretion in failing to set aside the default judgment is without merit. MCR 2.603(D)(1) provides that

> A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

A party seeking to set aside a default judgment must both file an affidavit showing a meritorious defense and demonstrate good cause. *Alken-Zeigler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229, 233; 600 NW2d 638 (1999). An appellate court will not set aside a trial court's ruling on a motion to set aside a default judgment unless there has been a clear abuse of discretion. *Id.* at 227. Such an abuse occurs only when the trial court's result is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *Id.*

Plaintiff moved for entry of the default judgment under both MCR 2.401(G)(1) and MCR 2.313(B)(2)(c). MCR 2.401(G)(1)(2) provides that the "[f]ailure of a party or the party's attorney to attend a scheduled conference, as directed by the Court, constitutes a default to which MCR 2.603 is applicable." In addition MCR 2.313(B)(2)(c) provides that if a party fails to obey an order to provide or permit discovery, the court may render "a judgment by default against the disobedient party." The

record indicates that the trial court relied on both MCR 2.401(G)(1) and 2.313(B)(2)(c) in entering the default judgment.[1]

Defendants contend that they have met both prongs of the test for setting aside a default under MCR 2.603(D)(1). However, even assuming that defendants have met the "meritorious defense" requirement of MCR 2.603(D)(1), they have not shown good cause to set aside the default judgment. First, defendants contend that they have shown good cause because the trial court's order of default would be "a manifest injustice in that the [d]efendants had presented a viable and meritorious defense and the [c]ourt should have considered summary disposition of [p]laintiff's claims." The existence of a meritorious defense does not, in and of itself, present the good cause necessary to set aside a default judgment. See *Alken-Zeigler*, *supra* at 229-234. As our Supreme Court observed in *Alken-Zeigler*, *supra* at 230-231, the "manifest injustice" test referred to by defendants arose from a reference to the Authors' Comments to 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 662 of the predecessor court rule, GCR 1963, 520.4, in which the authors stated that "good cause" would seem to include:

> (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.

The Court further observed:

> The first two prongs of the Honigman & Hawkins "good cause" test are unremarkable and accurately reflect our decisions. It is the third factor, "manifest injustice," that has been problematic. The difficulty has arisen because, properly viewed, "manifest injustice" is not a discrete occurrence such as a procedural defect or a tardy filing that can be assessed independently. Rather, manifest injustice is the result that would occur if a default were to be allowed to stand where a party has satisfied the

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[1] The trial court made the following statement at the hearing on plaintiff's motion for entry of default judgment:

> Well, there is liability. I think that the motion [for entry of default judgment] should be granted. [Defendants] didn't show up at the pretrial conference, they haven't been very cooperative with the Court, complying with materials ordered and requested. They have provided, in part, partial observance to the court order, so as to liability, I grant the motion.

In addition, at the hearing on defendants' motion to set aside the default, the trial court noted that it was defaulting defendants "on a number of bases," one of which was defendants' "failure to cooperate with the Court."

> "meritorious defense" and "good cause" requirements of the court rule. When a party puts forth a meritorious defense and then attempts to satisfy "good cause" by showing (1) a procedural irregularity or defect, or (2) a reasonable excuse for failure to comply with the requirements that created the default, the strength of the defense obviously will affect the "good cause" showing that is necessary. In other words, if a party states a meritorious defense that would be absolute if proven, a lesser showing of "good cause" will be required than if the defense were weaker, in order to prevent a manifest injustice. [Footnote omitted.]
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> In the instant case, the Court of Appeals was persuaded that the defendant had stated a meritorious defense, but affirmed that the defendant had not alleged a procedural irregularity or defect, and had not given a reasonable explanation for its filing failure. Nonetheless, the Court ruled that the circuit court had abused its discretion in not setting aside the default because there were factual questions . . . with respect to the plaintiff's contract action. As we have explained, this was an improper blurring of the "meritorious defense" and "good cause" requirements of MCR 2.603(D)(1). [*Id.* at 233-234.]

Here, defendants are attempting to do that which our Supreme Court rejected in *Alken-Zeigler*, i.e., to prove the "good cause" prong of MCR 2.603(D)(1) by claiming that manifest injustice will occur because they have presented a viable and meritorious defense. Consequently, we reject defendants' claim that "good cause" exists because manifest injustice will occur.

Second, defendants contend that the circumstances relating to their failure to attend the pre-trial conference establishes good cause for setting aside the default.[2] Approximately four months before the pre-trial conference, defendants' attorney advised them that the notice for the conference "indicates that your presence is required but I will be asking that your attendance is not required as long as you are available by telephone." Consequently, defendants, a retired couple living in Arizona, relied on this letter and were prepared to participate in the pre-trial conference by telephone. The issue of defendants' attendance at the pre-trial conference was further confused because, while their attorney had filed a motion to withdraw before the conference, he apparently agreed to attend the conference on defendants' behalf. Under these circumstances, defendants' claim that the trial court abused its discretion in ordering the extreme sanction of a default judgment under MCR 2.401(G)(1) because they failed to physically appear at the pre-trial conference. We disagree. The trial court's scheduling order gave defendants over nine months' notice of the June 24, 1997 pre-trial conference and stated in pertinent part that "CLIENTS, INCLUDING INSURANCE REPRESENTATIVES, SHALL BE PRESENT AT THE PRETRIAL CONFERENCE, unless expressly waived by the Judge." The letter from defendants' attorney did not advise defendants that they did not need to be present for the pre-trial

[2] Review of this issue is hampered because defendants have not produced a transcript of the June 24, 1997 pre-trial conference. For purposes of this discussion, we have accepted the facts as represented by defense counsel during the hearing on plaintiff's motion for entry of default judgment.

conference, but indicated only that the attorney would be asking to have their attendance excused. Defendants knew that they had a problem with their representation in the lawsuit, because their attorney had filed a motion to withdraw before the conference.

In addition, we note that the trial court also based its entry of the default judgment on defendants' failure to comply with discovery orders pursuant to MCR 2.313(B)(2)(c), finding that defendants provided only "partial observance" of its orders compelling compliance. The entry of a default judgment as a sanction for discovery abuses is a drastic measure that should be used with caution, *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994), and should be ordered "only when there has been a flagrant and wanton refusal to facilitate discovery," *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). Here, the trial court's conclusion was based on two orders compelling discovery. In its March 13, 1997 order, the court directed defendants to disclose to plaintiffs the identity of the persons who provided defendants MLS data and to provide information to plaintiff regarding the circumstances relative to the providing of this information. The court ordered that defendants "shall be precise in disclosing the nature of the data provided by each person identified." Then, on May 28, 1997, the court ordered defendants to serve plaintiff within fourteen days with all documents requested by plaintiff in its requests for production of documents dated January 27, 1997 and "complete answers" to interrogatories of the same date. The court ordered defendants to pay plaintiff $500 as attorney fees and costs for having to file the motion to compel and further ordered "that if the Defendants do not fully comply with this Order within 14 days of the date of this Order, a default judgment shall be entered against them."

At the hearing on the motion for entry of the default judgment, plaintiff asserted that defendants failed to produce the materials referred to in the May 28 order within the allotted fourteen days. Plaintiff's counsel also asserted that while defense counsel allowed plaintiff to view the tax returns and other records, plaintiff was not allowed to make copies, and that plaintiff did not produce copies until well after the fourteen-day deadline. In addition, plaintiff asserted that contrary to the court's March 13 order, defendants did not provide plaintiff with information regarding the circumstances under which the MLS data was provided to defendants. Defense counsel admitted that "there was a problem" with defendants regarding the tax returns but that defendants produced all of the tax returns after they "patched up" their attorney-client relationship. While dismissal for noncompliance is not favored "where there is an ambiguous showing of wilfulness on the part of the noncomplying party," *Daugherty v Michigan (After Remand)*, 163 Mich App 697, 702; 415 NW2d 279 (1987), we find that defendants' refusal to provide plaintiff with the tax returns and other discovery constituted willful disobedience of the court's order. See *Jack's Factory Outlet v Pontiac State Bank*, 95 Mich App 174, 179; 290 NW2d 114 (1980).

Furthermore, we note that defendant Jeanne lied during her deposition, as indicated by defendants' admission in their trial brief that, in order to protect certain individuals, she "came up with a story" during her deposition that the term "MLS" as contained in the appraisal referred to "Mentzer Listing Service" rather than plaintiff's "Multiple Listing Service." The significance of defendant Jeanne's "story" is evident from the fact that plaintiff amended its complaint to include additional counts addressing the consumer confusion created by the so-called "Mentzer Listing Service." While a trial

court can enter a default judgment under MCR 2.302(E) to sanction a party for failing to supplement a prior discovery response that the party knows is incorrect, *Traxler v Ford Motor Co*, 227 Mich App 276, 280-281; 576 NW2d 398 (1998), the trial court in this case did not make any findings regarding defendant Jeanne's lack of truthfulness when it granted plaintiff's motion for the default judgment. Nonetheless, the trial court could have considered defendants' admission in their trial brief that defendant Jeanne "made up a story" during her deposition as further evidence of defendants' intent to frustrate the discovery process. Defendants have not established good cause to set aside the default judgment. Accordingly, we affirm the trial court's order denying defendants' motion to set aside the default judgment.

II.

Next, defendants claim that the trial court failed to set forth sufficient findings of fact and conclusions of law to support a judgment against defendants in the amount of $341,076. We agree. This Court reviews the trial court's findings of fact for clear error and its conclusions of law de novo. *Omnicom of Michigan v Gianetti Investment Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997); MCR 2.613(C). MCR 2.517(A)(1) requires that in actions tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." While the trial court's pertinent findings and conclusions on the contested matters may be brief, MCR 2.517(A)(2), the purpose of the court's articulation of its findings is to facilitate appellate review. *People v Johnson (On Rehearing)*, 208 Mich App 137, 141; 526 NW2d 617 (1994).

Because the trial court entered a default judgment as to liability, the default judgment was equivalent to an admission by defendants to all of the matters well pleaded. *Sahn v Brisson*, 43 Mich App 666, 670-671; 204 NW2d 692 (1972). However, the court did not determine separate measures of damages for each of the different counts. Rather, it concluded:

> Plaintiff believes Defendant has misappropriated its property, has become unjustly enriched, and has violated its trademarks. The Court believes the Plaintiff has proven all of this by clear and convincing evidence, if not beyond a reasonable doubt, certainly beyond the greater weight of the evidence.
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> * * *
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> Plaintiff contends damages should be calculated pursuant to [plaintiff's] Exhibit 63. Defendants contend that the Plaintiff should not receive the benefit of other services provided other than the original appraisal. The Court agrees with this assessment. Therefore, the damage figure of $406,076 should be reduced by the sum of $65,000, which would equal $341,076, if my math is correct. You fellas can check that out.

The trial court's adoption of plaintiff's exhibit 63 as a measure of damages, without explaining the summaries contained in the exhibit or clarifying the time period represented in the exhibit defeats the

purpose of MCR 2.517 by requiring this Court to speculate regarding the trial court's method of awarding damages.[3]

Furthermore, the trial court made no conclusions of law regarding the measure of damages under plaintiff's legal theories. Under a theory of misappropriation of a trade secret, the defendants' profits derived from the unlawful use of the trade secret may be recovered on an unjust enrichment theory without proof that profits would otherwise have inured to the plaintiff, where the defendant participates in a third-party's violation of a fiduciary duty owed to the plaintiff. For example, in *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 187; 364 NW2d 609 (1984), our Supreme Court held that a third party that knowingly participated in the defendant's misappropriation of trade secrets from his employer was liable for both actual damages and unjust enrichment damages. Similarly, in *Kubik, Inc, v Hull*, 56 Mich App 335, 364; 224 NW2d 80 (1974), which involved the defendant's misappropriation of drawings of manifold modifications to a hydrostatic drive unit, this Court held that in determining the amount of the plaintiff's damages the trial court may consider:

> the amount of time, labor and money expended by plaintiff in designing, fabricating, and testing the manifold's modification; profits lost by plaintiff as a result of defendant Hull's misappropriation; the existence or absence of competitors other than defendant who manufacture equipment embodying the modification. We are confident that the parties will present for the trial court's consideration other factors to be considered in arriving at the aggregate damages assessable. Our suggestions here are only illustrative and are in no way to be construed as limiting the traditional power of the trial court to assess damages for the purpose of compensating plaintiff for the loss he sustained as the result of defendant Hull's misappropriation of the trade secret.

Here, the trial court merely awarded plaintiff damages equal to defendants' net income from April 23, 1990 through, apparently, May 31, 1996, without any explanation with respect to how it reached this result. Given the complex nature of a cause of action for misappropriation of a trade secret, we believe that the trial court should have set forth its method for compensating plaintiff.

Next, with respect to plaintiff's trademark claims, we note that the traditional remedy for trademark dilution is an injunction, not damages. *Jet, Inc v Sewage Aeration Systems*, 165 F3d 419, 424 (CA 6, 1999). Finally, under the equitable doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of another is required to make restitution to the injured party. *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 185; 504 NW2d 635 (1993). Under this remedy, the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received. *Id.* at 185-186. Here, the trial court rejected the theory that plaintiff's damages should be limited to the subscription cost of the MLS data wrongfully appropriated by defendants, and apparently awarded plaintiff the amount of defendants' net profits

[3] For example, exhibit 63 includes revenues and expenses for the time periods of "4/23/90 to 6/30/92," "7/1/92 to 5/31/95" and "*6/1/95 to 5/31/95*" (emphasis added).

because the proofs at trial demonstrated that the gathering of this information by defendants would be time-consuming and expensive. However, the court failed to explain how it determined this amount of restitution, which far exceeded the annual subscription cost of the MLS, and which amounted to a windfall for plaintiff. Accordingly, we find that the trial court failed to set forth sufficient findings of fact and conclusions of law to support its judgment of $341,076 and vacate its judgment.

We affirm the trial court's entry of default judgment with respect to liability, but vacate its judgment awarding plaintiff damages and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Peter D. O'Connell